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IN THE

Supreme Court of the United States

October Term, 1986

RICHARD POPE and
CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT

AMICUS CURIAE BRIEF OF THE CITY OF SANTA ANA, CALIFORNIA, IN SUPPORT OF RESPONDENT

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AMICUS CURIAE BRIEF OF THE CITY OF SANTA ANA, CALIFORNIA, IN SUPPORT OF RESPONDENT

For the past ten years, the City of Santa Ana has been engaged in continuous obscenity litigation with the Mitchell

Brothers' Santa Ana Theater in Santa Ana, seeking through civil public nuisance abatement litigation to abate the exhibition of hard-core pornographic films being exhibited daily at the Mitchell Brothers' Theater. Operators of the theater freely admit that they exhibit nothing but "hard-core pornography". Continuous weekly surveillances by the City during that ten year period confirm the truthfulness of the Mitchell Brothers' open admission. Under California law, the exhibition of "hard-core pornographic" films is unlawful. See Justice Tobriner's opinion in Zeitlin v. Arnebergh, 59 Cal.2d 901 (1963). Under California law, "hard-core pornography" is also a public nuisance per se. See Justice Richardson's opinion in People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42 (1976).

During the 1981, 1982 and 1985 October Terms of this Court, Amicus Curiae has attempted, without success, to place its problem before this Court for a resolution of the fundamental issue of "closure" of a place which deals only in "hard-core pornography", as a public nuisance. See "Petition for Writ of Certiorari" in People ex rel. Cooper, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term, 1981, No. 81-271; "Petition for Writ of Certiorari" in Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term, 1982, No. 82-345; "Petitioner's Reply and Supplemental Brief" in No. 81-271; "Petitioner's Motion for Leave to File Out-of-Time Petition for Rehearing, With Petition for Rehearing Annexed", October Term,

1981, No. 81-271; "Petition for Writ of Certiorari" in People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term, 1985, No. 85-439; and "Petition for Rehearing", October Term, 1985, No. 85-439. More recently, during the 1986 October Term of Court, Amicus Curiae has been equally unsuccessful in requesting this Court to address that unresolved issue through other cases on this Court's calendar. See Amicus Curiae Brief of the City of Santa Ana, California, in support of Petitioners in People of the State of New York, ex rel. Arcara v. Cloud Books, Inc., October Term, 1986, No. 85-437; and in City of Paducah, et al. v. Investment Entertainment, Inc., October Term, 1986, No. 86-307. This Court's unwillingness, at this time, to address the "closure"

issue in relation to "hard-core pornography" has made it more difficult for Amicus Curiae to contain the exhibition of "hard-core pornography" in Santa Ana and carry on the public nuisance abatement litigation in the California State Court System.

In this Brief, Amicus Curiae urges this Court to use its grant of certiorari in Pope v. Illinois and Morrison v. Illinois, No. 85-1973 as a vehicle to enunciate a strong judicial policy in support of this nation's federal obscenity laws and, concomitantly, to derive and construct an analysis which will produce a catalyst at the federal level for the suppression of "hard-core pornography", which is the crux of Amicus Curiae's problems in Santa Ana, California. This the Court can accomplish by: (1) applying tne analogy of "negligence" and "due care"

used by the late Judge Learned Hand in U.S. v. Kennerley, 209 Fed. 119 (S.D.N.Y., 1913) and in U.S. v. Levine, 83 F.2d 156, 157 (1936); and (2) by adopting the analysis, and applying the two separate and distinct tests for the federal review of state and federal obscenity determinations, expressed by Associate Justice Harlan in U.S. v. Roth, 354 U.S. 476 at 496-509, and in Jacobellis v. Ohio, 378 U.S. 184 at pages 203-204.

STATEMENT OF THE CASE

The question presented herein is: "Whether contemporary community standards are to be applied to the value element of the tripartite test for obscenity articulated in Miller v. California, 413 U.S. 15 (1973)."

Pope was charged with three counts of obscenity (Ill. Rev. Stat., 1983, Ch.

38, para. 11-20(a)(1)) for the sale of three obscene magazines "Full Throttle", "Fuck Around" and "Anal Animal" on July 21, 1983 at an adult book store located at 623 7th Street, Rockford, Illinois. Morrison was charged with three counts of obscenity (Ill. Rev. Stat., 1983, Ch. 38, para. 11-20(a)(1)) for the sale of three obscene magazines "Solo Suckoff", "Rubber Suckers" and "She-Male Subjugation" on July 21, 1983 at an adult book store located at 519 W. State Street, Rockford, Illinois.

At jury trials, both defendants were found guilty on all three counts. In each case, a pre-trial motion to dismiss was filed which asserted, among other things: (1) that the three magazines were constitutionally protected (Motion to Dismiss at para. 6); and (2) that the Illinois obscenity statute was unconstitutional in that it failed

to require that the element of "utterly without redeeming social value" be judged solely with reference to an objective standard, as opposed to reference to a contemporary community standard (Motion to Dismiss at para. 2(c)(ii) (J.A. 6-10, 20-24)). The motions were denied and confirmed by the trial court's refusal to grant the separate written post-trial motions filed on behalf of the defendants (J.A. 1, 3, 15-17, 27-30). See also, "Statement of the Case" in Brief for the Petitioners at page 3.

The Illinois Obscenity Statute, Illinois Revised Statutes, 1983, chapter 38, §§ 11-20, as construed by the Illinois Supreme Court in Ward v. Illinois, 431 U.S. 767, applies the constitutional standards enunciated in Miller v. California, 413 U.S. 15, except that the Illinois Statute

retained the "utterly without redeeming social value" test of Memoirs v. Mass, 383 U.S. 413 at 419 in place of the "lacks serious literary, artistic, political, or scientific value test" of Miller, supra.

Petitioners Pope and Morrison contend: (1) that the Illinois Obscenity Statute is constitutionally infirm on its face because it permits the jury in a criminal trial to apply the community standards of the State of Illinois to the "value" component of the Illinois test for obscenity (Brief for Petitioners, Point I); and (2) that the Illinois Obscenity Statute is unconstitutional as applied to the defendants and the six (6) magazines involved (Brief for Petitioners, Point II).

SUMMARY OF ARGUMENT

In the trials of Pope and Morrison

below, the trial judge decided the legal question in the motion to dismiss before trial. The trial court's denial of the defendant's motion to dismiss was a holding that the subject matter was not constitutionally protected. Procedurally, it was therefore proper for the trial court to submit the question of "value" to the criminal jury on the factual question, based upon the Illinois community standard. Because of the procedural history, the Illinois Statute, as applied below is not subject to attack in this Court on the grounds alleged; i.e., that the statute is infirm on its face because of a failure to employ an objective standard.

The Petitioners have also challenged the Illinois Obscenity Statute as applied to the defendants and the subject matter involved (Brief for the Petitioners at pages 29-32). That

challenge raises a further constitutional question as to the scope of this Court's jurisdiction in reviewing such state determinations.

Amicus Curiae contends that the proper scope for federal review of state determinations is that set forth by Justice Harlan in his opinions in U.S. v. Roth, supra, and Ohio v. Jacobellis, supra. Under Justice Harlan's view, different tests are applied to federal and state statutes, because under the Federal Constitution, federal statutes may only proscribe that subject matter which is "hard-core pornography". See here, the test for "hard-core pornography" set forth in Morris v. U.S., 257 A.2d 341 (1969): "reasonable men could not differ and they could come to but one conclusion; i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre,

without any artistic or scientific purpose or justification".

Under Justice Harlan's view, the test for reviewing state obscenity determinations is simply one of "rationality". Under that "rationality" test, an examination of the Illinois Statute and six (6) magazines in question require that the petitioners' constitutional claims be rejected.

Further, were a federal statute being applied, that claim would also fail because the subject matter would qualify as "hard-core pornography" under the federal standard for review of federal determinations.

ARGUMENT

I

APPLYING THE ANALOGY USED BY JUDGE LEARNED HAND THAT THE DETERMINATION OF OBSCENITY IS LIKE THE DETERMINATION OF THE STANDARD OF CARE IN NEGLIGENCE CASES, THE TRIAL JUDGE WAS CORRECT IN INSTRUCTING THE CRIMINAL JURY ON "SOCIAL VALUE" IN TERMS OF THE COMMUNITY STANDARDS OF THE STATE OF ILLINOIS.

At Point I of the Brief of Petitioners, a claim is made that the Illinois Obscenity Statute (Ill. Rev. Stat., 1983, Ch. 38, para. 11-20(a)(1)) is constitutionally infirm because it permits the jury in a criminal trial to apply a state community standard to the "value" component of the Illinois test for Obscenity, rather than an "objective" standard. That objection is not well taken because, from a procedural standpoint, the jury was only making a factual determination of what is obscene under Illinois law. It was not making a constitutional determina-

tion of what is protected material under the First Amendment to the Federal Constitution.

Historically, the constitutional standard expressed by Justice Brennan in Roth v. U.S., 354 U.S. 476, had its genesis in an opinion written by Judge Learned Hand, U.S. v. Kennerly, 209 Fed. 119 (S.D.N.Y., 1913), often called the "architect" and "father" of modern obscenity law. In that decision, Judge Learned Hand disapproved of the rule in Regina v. Hicklin, L.R. 3 Q.B. 36, and originated the rule that the determination on "obscenity" was a jury question, drawing an analogy to the standard of care in negligence cases, as a jury question. In U.S. v. Kennerly, 209 Fed. 119 (S.D.N.Y., 1913), Justice Learned Hand had tne following to say in this regard, at page 121:

". . . If there be no abstract

> definition such as I have suggested, should not the word 'obscene' be allowed to indicate the present, critical point in compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. . . .
>
> " Nor is it an objection, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech."

In a later case, U.S. v. Levine, 83 F.2d 156, 157 (1936), cited in Roth-Alberts, 354 U.S. 476 at footnote 26, as consistent with the obscenity law expressed therein, Judge Hand called the

verdict on "obscenity" a "small bit of legislation ad hoc, like the standard of care which the Constitution imposes on a jury as a 'duty'", at page 157:

> " As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury (Rosen v. United States, supra, 161 U.S. 29, 42, 16 S.Ct. 434, 480, 40 L.Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. . . . . Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a syllogism of which they are to find only the minor premise but really a small bit of legislation ad hoc, like the standard of care." (Emphasis provided.)

The role of the juror in criminal obscenity cases, as explained by the late Associate Justice Tom C. Clark, Retired, sitting by designation in Smith v. U.S., ___ F.2d ___ (1976), affirmed in Smith v. U.S., 431 U.S. 291 (1977)

is:

" In support of his contention that he had a right to propound such questions to the jury panel on voir dire, Smith seems to say that as a matter of due process he has a 'right to inquire of the juror what "contemporary community standards" the juror has knowledge of, if any, and just which of the multiple "contemporary community standards" the juror will apply to him, and the nature of the "contemporary community standards" which the juror believes have application to him.' But it is for the jury under the instructions of the trial judge to determine whether the material under scrutiny, taken as a whole, appeals to the prurient interest; whether it depicts sexual conduct in a patently offensive way; and, finally, if taken as a whole, it lacks serious literary, artistic, political or scientific value. But this definition of obscenity is 'one of law*** a legal term of art,' Hamling v. United States, 418 U.S. 87, 118 (1974), not one of fact. Jurors pass on facts, not law. The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the 'resonable' or 'average' person in other areas of decision making. Jurors do not have such standards on their

> tongues; nor do they wear them on their sleeves; they are inborn and often undefinable." (Our emphasis.)

For an example of the confusion which has crept into this area of the law, see State of Hawaii v. Kam, 726 P.2d 263 (Oct. 9, 1986) where the Hawaii Supreme Court erroneously held that, before the criminal jury could apply the obscenity statute to the defendant's conduct, it must find that a contemporary community standard existed, rather than that the jury must "determine" the contemporary community standard and apply it to the defendant's conduct. See, City of Youngstown v. DeLoreto, 251 N.E.2d 491 (1969) for a correct example as to how the community standards are derived. In DeLoreto, the Ohio Court of Appeals held that the network of state laws on sexual morality establish the moral standards of the people of Ohio.

To say that obscenity is primarily a question of fact for the jury is not to suggest, that in every instance such is the case. The Court has its proper role as in the case of a motion to dismiss as a matter of law before or after trial; as does the jury in the case of an issue of fact. As the jury may sometimes overstep its bounds, U.S. v. Dennett, 39 F.2d 564, so also may a lower court, People v. Birch All State News, et al., 269 N.Y.S.2d 752, 754 (May 2, 1966), reversing 40 Misc.2d 626, 243 N.Y.S.2d 525 (September 6, 1963).

The test which defines the respective role of the court and a jury in a civil obscenity case is similar to that stated by Justice Brennan in his dissent in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 448, 1 L.Ed.2d 1469, 77 S.Ct. 1325 (June 24, 1957):

> "Of course, as with jury questions generally, the trial judge must

> initially determine that there is a jury question, i.e., that reasonable men may differ whether the material is obscene."

In civil actions involving the determination of obscenity by a jury, one of the basic functions of the trial court, as in negligence cases involving the standard of care, must be to determine whether the issue which is before the court is one of law or one of fact. In making that determination, the trial court must decide whether the subject matter is: (1) obscene as a matter of law, (2) a question of fact for the jury, or (3) constitutionally protected as a matter of law. If the subject matter is obscene "as a matter of law", the court must so instruct the jury, just as is its duty in tort cases to instruct that given conduct is "negligence" "as a matter of law".

In criminal cases involving the determination of obscenity in the

criminal context, a different situation is presented. On a motion to dismiss, either before a jury trial or after the jury trial, on the ground that the subject matter is protected by the Federal Constitution as a matter of law, the court must decide only whether the subject matter is: (1) constitutionally protected as a matter of law, or (2) is a question of fact for the jury's determination under proper instructions. This is so because of the constitutional right to a jury trial on all issues in criminal cases. The question of whether the subject matter is obscene as a matter of law does not present itself in a criminal case.

In the trials of Pope and Morrison, the issue of "value" which was before the two Illinois juries was, of necessity, a purely <u>factual</u> issue. That is so because of the <u>procedures</u> which

were pursued by the Petitioners during trial. The written pre-trial "Motions to Dismiss" of Pope and Morrison (J.A. 6-10, 20-24) raised not one but two constitutional questions for the trial court to decide: (1) whether the three magazines in each of the cases were protected as a matter of law, in which event the criminal charge should not be submitted to the jury, and (2) whether it was constitutionally possible for the Illinois State Legislature to enact a criminal obscenity statute which allowed the issue of "value", in relation to a criminal charge, to be submitted to the jury as a question of fact based upon the Illinois community standard. The trial judge, in denying the Petitioners' motions to dismiss the criminal complaints on the ground that the subject matter was constitutionally protected, answered the first constitu-

tional question; it therefore was entirely proper and, in fact, necessary for the court to submit the criminal charge and issue of "value" to the jury as a factual issue based upon the Illinois community standard. Because it was a criminal trial, the court could not advise the jury that it was "hard-core pornography", as in fact it was.

II

PETITIONERS' SECOND CHALLENGE-- THAT THE ILLINOIS STATUTE CANNOT BE CONSTITUTIONALLY APPLIED TO THE DEFENDANTS AND THE SUBJECT MATTER-- PLACES IN ISSUE THE NATURE AND SCOPE OF THE FEDERAL REVIEW OF STATE OBSCENITY DETERMINATIONS. ON THAT ISSUE, AMICUS URGES THIS COURT TO ADOPT THE HARLAN "RATIONALITY" TEST EXPRESSED IN JACOBELLIS V. OHIO, UNDER WHICH PETITIONERS' CONSTITUTIONAL CLAIM MUST BE REJECTED.

At Point II of the Brief for Petitioners, a claim is made that the Illinois Obscenity Statute (Ill. Rev. Stat., 1983, Ch. 38, para. 11-20(a)(1)) is unconstitutional as applied to the

defendants and the six (6) magazines in question. That challenge places in issue the nature and scope of federal review of state obscenity determinations. On that issue, Amicus urges this Court to retreat to and adopt the Harlan view expressed in Jacobellis v. Ohio.

By adopting the Harlan view of federal review (hard-core Pornography) and state review (rationality test) of obscenity determinations, this Court can achieve three worthwhile objectives: (1) it can return to state obscenity determinations the sound traditional legal principles espoused by Justice Learned Hand, the architect of modern obscenity law, which analogized the factual determination of "negligence" and "standard of due care" to the factual determination of "obscenity" and the "standard of common decency in the community"; (2) it will nullify the bad

law expressed in Jacobellis regarding "The Lovers" case, which removed from state courts the power to criminally proscribe the explicit depiction of sexual intercourse upon the public screens, a function which traditionally has belonged to state governments; and (3) it will restore to the federal government its primary and preemptive (but limited) responsibility for the suppression of "hard-core pornography". See, here, the test for "hard-core pornography" set forth in Morris v. U.S., 257 A.2d 341 (1969): "reasonable men could not differ and could come to but one conclusion; i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification".

(A) Under Justice Harlan's Test For Federal Review Of Federal Obscenity Determinations, The Federal Statutes May Only Proscribe "Hard-Core Pornography".

Under Federal law, "obscenity" has been declared to be "contraband", U.S. v. 37 Photographs, 402 U.S. 363 at 376. Amicus submits that 19 U.S.C. § 1305(a) which declares that "obscene" subject matter under Federal law is "contraband" must be construed as establishing a "pre-emption" and demonstrates that Justice Harlan's view is correct in that, to reconcile such a federal "forfeiture" with traditional state powers relating to personal property rights, requires that the term "obscenity" under federal standards be restricted to "hard-core pornography".

"Forfeiture" relief relating to the illegal character of the property itself (i.e., whether or not it is capable of ownership) is not the same type of

"forfeiture" penalty which arises in connection with the use of automobiles in narcotic, or money in gambling cases, wherein the court litigates the illegality of the activity involved. In the latter case the court declares a cessation of property rights which did at one time exist in said material. This stands in sharp contrast to the remedy of equitable forfeiture pursuant to 19 U.S.C. § 1305(a) where obscene material is the subject of the action. A judicial declaration of forfeiture pursuant to the federal importation statute, 19 U.S.C. § 1305(a), mandates the forfeiture of obscene material, not as a remedy for illegal conduct, but incident to a determination of status, i.e., that no property rights ever existed in said property. See U.S. v. 37 Photographs, supra. See, also, Warsaw v. Eastman Kodak Co., 252 S.E.2d

182 (Jan. 11, 1979).

It would appear that because of the federal provision on forfeiture, federal law has occupied the field, at least on the question of whether "hard-core pornography" is to be tolerated. Accordingly, the disposition of "hard-core pornography", inherently, is a matter for federal control (Harlan's view). The network of federal statutes bears this out. In Congress assembled, the representatives of the several states have established a comprehensive set of federal controls on obscenity over: (1) importation from abroad, (2) use of the mails, and (3) transportation in interstate commerce. See 18 U.S.C. §§ 1461-1465, 1735, 1737; 19 U.S.C. § 1305. Those controls have been supplemented by treaty abroad. See Roth v. U.S., 354 U.S. 476 at footnote 15, which refers to the 1911 "Agreement for

the Suppression of the Circulation of Obscene Publications", 37 Stat. 1511-1515, wherein the United States expressed the national desire to repress "offenses connected with obscene publications" and entered into a mutual compact with other nations to that end.

While Congress has never established a definition of obscenity, it has not been silent about whether or not obscenity should be proscribed at the federal level, cf., Justice Harlan's discussion of the category of obscenity, "hard-core pornography", and federal power in relation thereto, cited with approval in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607. See also, the Congressional finding of fact and declaration of policy in Public Law 90-100, 81 Stat. 253, enacted October 3, 1967, creating the Commission on Obscenity and

Pornography, which held that the traffic in obscenity and pornography is a matter of nation concern. See § 1 of Public Law 90-100 which provided:

> "Section 1. Finding of fact and declaration of policy. -The Congress finds that the traffic in obscenity and pornography is a matter of national concern. The problem, however, is not one which can be solved at any one level of government. The Federal Government has a responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials. The State and local governments have an equal responsibility in the exercise of their regulatory powers and any attempts to control this transmission should be a coordinated effort at the various governmental levels."

In Roth v. U.S., 354 U.S. 476 at 484, this Court took notice of the primacy of the role of the National Government:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This

> rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, . . ."

(B) Under The "One People" Concept The Federal Government Has Primary Jurisdiction Over "Hard-Core Pornography" (Harlan's View).

Obscenity is, under the "one people" concept, a matter of state and federal interest. Independent federal interests have been "identified" by this Court in the well-documented views of Justice Harlan. See, for example, Roth v. U.S., 354 U.S. at 497-498. Amicus submits that the foundation for Harlan's views are to be found in the "one people" concept.

The "one people" concept of federalism (see Hoke v. U.S., 277 U.S. 308 (Feb. 24, 1913)), envisions the federal government as having been granted plenary power to control the

mails and interstate commerce, and charged with the concomitant duty and responsibility of administering those controls, which have been established by their representatives at the national level, in a way which will safeguard the standards of public decency (morality) which are common to the individual State members of the compact. Under the "one people" concept, the federal government has total control over subject matter as to which reasonable minds would not differ and all would hold to be pornographic (hard-core pornography). See Part XIV, entitled "The 'One People' Concept", appearing in "The Challenge of a Modern Federal Criminal Code, Statement in the U.S. Senate by Senator John L. McClellan, March 11, 1971, in Hearings Before the Subcommittee on Criminal Law and Procedures of the Committee on the Judiciary, United

States Senate, Ninty-second Congress, First Session, Part 1", at page 30. */

*/ XIV. THE "ONE PEOPLE" CONCEPT. Between the Code of 1909 and the codification of 1948, a number of significant new Federal criminal offenses were enacted. Their significance can be best understood, however, by prefacing their consideration by a reference to Madison's conception of the scope of the powers of the Federal Government. In the Federalist No. 44, he observed:

The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce; with last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.

This limited conception of the role of the Federal Government stands in sharp contrast, of course, with what as a matter of history has come to pass. For example, in June, 1910, less than 6 months after the Code of 1909 went into effect, Congress passed the Mann Act, a provision against the "moral misuse" of the facilities of interstate commerce. (Act of June 25, 1910, c. 395, 36 Stat. 825.) In Hoke v. United States, 277 U.S. 308, 322 (1913), upholding the act, Mr. Justice McKenna employed expressions which, when considered, serve as a reminder that, since 1872, Congress had been acting, intermittently, upon a principle foreign to Madison's that did not come into application until after the

In granting such obscenity controls to the Federal government, it was the expectation of the compact States that the Federal government would administer those powers to suppress that subject

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(Footnote continued from preceding page.)
Civil War. He said:

"Our dual form of government has its perplexities . . . but it must be kept in mind that we are one people . . . and the powers (granted to the Federal government) . . . are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."

The inference is plain. Lotteries, frauds, circulation of obscene literature, prostitution, narcotic addiction, all were, at first, well within what Madison had in mind when he commented that the powers reserved to the States extended to "all objects which, in the ordinary course of affairs, concern . . . the internal order, improvement, and prosperity of the state." The trouble was that it proved, as we became not only one people, but one nation, impossible for the States, under their own powers, effectually to preserve "internal order" in these matters when the facilities of the mails were seen to operate, in one fashion, and the privileges of interstate commerce, in another, to negate the efforts of any state to suppress what the people of the nation saw as national evils. In the judgment of many, these evils were pervasive throughout the whole nation. There were, moreover, Federal constitutional powers under which they could be attacked by the enactment of federal criminal legislation. From time to time, therefore, Congress made use of the powers assigned to the general government, singly or in combination, "to promote the general welfare, material and moral."

matter which was considered to be injurious to the public morals of all of the States as a whole, as declared by their representatives in federal legislation. See Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903), where the court said at pages 356 and 357:

> " If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. . . . But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals. . . . As a State may, for the purpose of guarding the morals of

> its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States--perhaps all of them-- which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. . . ." (Our emphasis.)

In enumerating his "hard-core pornography" rule limitation on federal power, Harlan used as a common denominator that "bottom of the barrel"

quality of material as to which it might be said that reasonable minds would not differ, and could come to but one conclusion.

At page 21 of the "Brief for the Petitioners", it is noted that: "seven states currently have no statutes which proscribe the dissemination of sexually explicit materials to adults (Alaska, Maine, Montana, Oregon, South Dakota, Vermont and Wisconsin). Although this Court said in Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 64, 37 L.Ed.2d 446 at 461, 93 S.Ct. 2628, June 21, 1973:

> " The States, of course, may follow such a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the market place, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. . . . " (Our emphasis.)

this Court did not say that hard-core

pornography, which under federal law may not be imported, may not be placed in the mail, may have no property value, may not be copyrighted and may not be sent interstate, can nevertheless be given a legal status and value within such states. See Smith v. U.S., supra. See, in this regard, the expression in Roth-Alberts, 354 U.S. 476, 485, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) that it is the universal judgment of civilized nations as reflected in their international agreements, that obscenity should be restrained. This Court can clarify its ambiguous statement in Paris Adult Theatre I, supra, by embracing the Harlan view expressed in Roth v. U.S., 354 U.S. 476, at 500, and explaining that what the Court was talking about, in so far as States are concerned, was subject matter within their jurisdiction, which was

less than "hard-core pornography" (reasonable men would not differ and could come to but one conclusion), and yet not quite "protected speech", (Justice Harlan's view).

(C) Under Justice Harlan's "Rationality" Test For Federal Review Of State Obscenity Determinations, The Petitioners' Constitutional Claims Must Be Rejected.

By way of contrast, under Justice Harlan's view, the federal test for review of state obscenity determinations is simply one of "rationality". Accordingly, under Justice Harlan's "rationality" test and this Court examination of the Illinois statute and magazines in question, the Petitioners' constitutional claims must be rejected. See Jacobellis v. Ohio, 378 U.S. 184 at 204:

> ". . . As to the States, I would make the federal test one of rationality. I would not prohibit them from banning any material

> which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.
>
> " On this basis, having viewed the motion picture in question, I think the State acted within permissible limits in condemning the film and would affirm the judgment of the Ohio Supreme Court."

Further, were a federal statute being applied, the six (6) magazines would also constitute "hard-core pornography" under the federal standard. See Associate Justice Rehnquist's opinion, speaking for a majority of this Court in New York v. P.J. Video, Inc., ___ U.S. ___, 89 L.Ed.2d 871 at 881 (Apr. 22, 1986).

III

THE ATTEMPT OF AMICUS CURIAE TO CONTAIN "HARD-CORE PORNOGRAPHIC EXHIBITIONS" IN SANTA ANA HAS BEEN MADE MORE DIFFICULT BY A LACK OF ENFORCEMENT OF THE FEDERAL LAWS AGAINST "HARD-CORE PORNOGRAPHY". THIS COURT SHOULD ADDRESS THAT PROBLEM AND ENUNCIATE A STRONG JUDICIAL POLICY AGAINST THE EXHIBITION OF "HARD-CORE PORNOGRAPHY".

Notwithstanding the comprehensive nature of the above network of federal obscenity laws, the enforcement of those federal laws against "hard-core pornography" by the administrative branch of the Federal Government has come to a virtual standstill. As a result, the prediction of defendant theater operator James Mitchell in 1978 at Santa Ana's first public nuisance abatement trial, that the hard-core pornographic films then being exhibited at the Mitchell Brothers' Santa Ana Theater would be regularly exhibited on television within 5 years, has become a reality.

Amicus Curiae submits that the obscenity opinions of this Court during the past 30 years (since Roth-Alberts) have not articulated a strong judicial policy which is supportive of the federal legislative policy against "hard-core pornography". As a result, there is a corresponding diminished support in the State courts for the enforcement of state laws proscribing "hard-core pornography". What is needed is a judicial expression from this Court of strong support for the proscription of "hard-core pornography". It is the opinion of this Amicus that if such a pronouncement were forthcoming, as hereinabove suggested is possible under the issues framed in this Petition, the problems of Amicus Curiae in the containment of such materials at the State level would be materially lessened.

CONCLUSION

The Illinois State Legislature was not precluded from requiring that in a criminal trial the "value" test of the State Obscenity Statute be determined by the Illinios jury based upon an Illinois community standard rather than an objective standard. Under the "rationality" test for federal review of state obscenity determinations. the Illinios State Obscenity Statute is Constitutional, both on its face and as applied to the six (6) magazines. Further, were this Court reviewing a federal jury determination in a criminal trial based on one of the federal statutes, the result would be the same because the six (6) magazines would qualify as "hard-core pornography" under the federal standard of review of federal obscenity determinations.

DATED: December 22, 1986

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this 23rd day of December, 1986, the original and forty (40) copies of the within Amicus Curiae Brief of the City of Santa Ana, California, were deposited in the United States Post Office in Sun Valley, California, with Express Mail Postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, First Class postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served:

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